

No. SC84587

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IN THE MISSOURI SUPREME COURT

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STATE ex rel. ROBERT L. MEIER

Petitioner,

v.

GENE STUBBLEFIELD, SUPERINTENDENT  
MISSOURI EASTERN CORRECTIONAL CENTER

Respondent.

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ORIGINAL HABEAS CORPUS PROCEEDING

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REPLY BRIEF OF PETITIONER ROBERT L. MEIER

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## **LEGAL ARGUMENT**

**I. Petitioner Robert Meier is unlawfully restrained by Respondent and is entitled to a writ of habeas corpus ordering him re-sentenced even though he procedurally defaulted under Rule 29.15 because:**

**A. Petitioner was actually and substantially disadvantaged when he received ineffective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution and article I, § 10 of the Missouri Constitution in that Petitioner’s attorney abandoned him without filing his appeal as directed, resulting in the complete denial of his right to appeal his conviction – a presumptively prejudicial attorney error; and**

**B. The cause of Petitioner’s procedural default – his attorney’s abandonment – was external to the defense in that he was not responsible for the abandonment and did not know about it.**

Respondent first asserts that Robert Meier is not entitled to a writ of habeas corpus because he has not shown “cause” for his procedural default. *Respondent’s Brief 8-10*. Respondent argues that Robert “knew” or “should have known” that his attorney had abandoned him because his attorney (eventually) stopped communicating with him and never delivered a notice of appeal to him. *Respondent’s Brief 8-9*. Respondent posits that these facts were sufficient to put Robert “on notice” within the deadline for moving for Rule 29.15 relief. *Respondent’s Brief 8*. In a footnote, Respondent also faults Robert for not attempting to file a late notice of appeal. *Respondent’s Brief 9-10 n.1*.

In his initial Brief, Robert explained that he did not know his attorney had abandoned him until Public Defender Douglas Hoff told him that his appeal was never filed. *Petitioner's Brief* 4-5, 20. Because he directed Mr. Kelly to file an appeal and had received a copy of the motion to proceed as a poor person on appeal, Robert thought that Mr. Kelly had, in fact, appealed his conviction. *Supplemental Affidavit of Robert Meier* ¶ 6 (hereinafter Affidavit) (the Affidavit is attached to the initial Brief at A1-A3); *Suggestions in Support of Petition for the Writ of Habeas Corpus* 2. Robert did not know that he had been abandoned until May, 2001, long after the deadline for Rule 29.15 or the one-year deadline for appealing out-of-time for good cause. *Affidavit* ¶ 10.

Robert's belief was reasonable. In other words, he should not have known that his attorney had abandoned him in time to move for Rule 29.15 relief. Respondent argues that Robert should have known he had been abandoned because his attorney did not send him a copy of the notice of appeal. *Respondent's Brief* 8. Similarly, Respondent argues that Robert should have filed a late notice of appeal. *Respondent's Brief* 9-10 n.1. Thus, Respondent assumes that a layperson – who has hired an attorney to advise and advocate for him – possesses sufficient legal savvy to monitor counsel's conduct and know (1) that a notice of appeal must be filed to perfect an appeal, and (2) the most expeditious remedy when counsel abandons him. This assumption is unreasonable. When a client directs his attorney to file an appeal, the client is justified in believing that the attorney will execute the proper legal steps to secure the appeal:

[A] defendant who instructs counsel to initiate an appeal  
reasonably relies upon counsel to file the necessary notice.

Counsel's failure to do so cannot be considered a strategic decision; filing a notice of appeal is a purely ministerial task, and the failure to file reflects inattention to the defendant's wishes.

*Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000).

Therefore, when Robert directed his attorney to appeal, he justifiably believed his attorney had appealed. His attorney was ineffective for not filing the appeal. *Id.* Robert (who was in prison at the time) did not need to determine whether his appeal was actually filed. Rather, Robert's attorney should have informed him that the appeal was **not** filed. He was ineffective for not doing so. *Strickland v. Washington*, 466 U.S. 668, 688 (1984) (counsel has a duty to consult with the client and keep him informed of important developments). This failure to inform was compounded by a third instance of ineffectiveness: Mr. Kelly misled Robert into believing that an appeal had been filed. *Id.*

Defendants are not responsible for attorney errors that constitute ineffective assistance of counsel. *Murray v. Carrier*, 477 U.S. 478, 488-89 (1986). Defendants are not responsible for raising claims of which they have no knowledge. *Brown v. State*, 66 S.W.3d 721, 731 (Mo. banc 2002). Individually and cumulatively, the facts show that Robert should not have known that his appeal had not been filed.

In addition, Robert should not have known that Mr. Kelly had abandoned him within the 90-day time limit under Rule 29.15 because the trial judge instructed Robert that he had ninety days to appeal. *Sentencing Hearing Tr. 13*. Apparently, the trial judge confused Robert's right to appeal and his right to post-conviction relief. Based on the

judge's incorrect statement of the law, Robert would have thought that he had ninety days to appeal, and therefore, would not have expected an appeal to be filed before the deadline for moving for Rule 29.15 relief expired.

Respondent next claims that Robert has not offered "substantial evidence" to prove that he directed his attorney to file a notice of appeal, citing *McIntosh v. Haynes*, 545 S.W.2d 647, 654 (Mo. banc 1977). *Respondent's Brief 13*. In *McIntosh*, a prisoner alleged that his dormitory was rat-infested. 545 S.W.2d at 648. The Court held that this allegation, if proven, might constitute cruel and unusual punishment that could be the subject of a habeas corpus petition. *Id.* at 652-53.

The Court found that petitioner had not proven his claim of rat-infestation by substantial evidence. *Id.* at 654. The parties stipulated to the facts. *Id.* at 648, 654. They stipulated that the warden had begun extermination procedures, and had received no complaints since that time. *Id.* at 648. However, they also stipulated that petitioner would testify that three other inmates told him they had seen rats since the extermination began. *Id.* There was no stipulation as to whether the dormitory was still rat-infested. *Id.* It was not clear if the rats were still present after extermination. The warden had received no complaints, but other inmates said they had seen rats. *Id.* On these uncertain facts, the Court held that petitioner had not proven his allegation of rat-infestation by substantial evidence. *Id.* at 654.

Here, Robert proved his allegation that he directed his attorney to file an appeal with substantial evidence. First, he averred that he directed his attorney to file an appeal in his petition and supplemental affidavit. *Affidavit* ¶¶ 3, 4, 5, 6; *Petition* ¶ 5. Unlike the

*McIntosh* stipulations, these firsthand averments were direct and substantial evidence of the dispositive issue. They are corroborated by the motion to proceed as a poor person, in which Mr. Kelly identified himself as “Attorney for Appellant.” *Suggestions*, Exhibit A. Mr. Kelly would not have filed an in forma pauperis motion or called himself the “Attorney for Appellant” unless Robert had directed him to appeal. The averments are also corroborated by Mr. Kelly’s letter to Ms. Adrienne Anderson (a Disciplinary Authority employee), which states that he had already filed the notice of appeal. *Suggestions*, Exhibit D. Though false, this statement shows that Mr. Kelly knew he was supposed to file the notice of appeal. Clearly, the evidence is substantial that Robert directed Mr. Kelly to file his appeal.

Nonetheless, Respondent assumes that the only proven fact was that a notice of appeal was not filed. *Respondent’s Brief* 13. He then argues that counsel should be presumed competent, and that counsel may have had a valid reason for not filing the appeal. *Respondent’s Brief* 13. Respondent’s mere speculation does not overcome Petitioner’s substantial evidence. As explained, Robert has proven that he directed Mr. Kelly to appeal. Further, Mr. Kelly was ineffective for not filing the appeal, regardless of his motive. *Flores-Ortega*, 528 U.S. at 477; *Schlup v. State*, 771 S.W.2d 895, 898 (Mo. App. 1989). An inquiry into counsel’s motives is proper only if the defendant did not specifically direct his attorney to appeal. *Flores-Ortega*, 528 U.S. at 478. Then, the Court must inquire whether the attorney consulted with the client, and, if not, whether that omission was ineffective assistance. *Id.* Here, Robert directed Mr. Kelly to appeal so Mr. Kelly’s motives are irrelevant.



Even if the Court believes that an inquiry into the attorney's motives is required, Robert has introduced evidence about his attorney's motives. Mr. Kelly thought an appeal (1) would be a waste of money; and (2) had no merit. *Petitioner's Brief* 15-17. Both motives are improper. *Jones v. Barnes*, 463 U.S. 745, 751 (1983) (the client decides whether to appeal); *Schlup*, 771 S.W.2d at 898 (same). Moreover, Robert has specifically disproven Respondent's proposed justification for the abandonment (Robert might have told him **not** to appeal). *Respondent's Brief* 13. All the evidence indicates that Robert directed his attorney to appeal.

The final issue is the appropriate remedy. Respondent asks this Court to refer the case to a special master under Rule 68.03. *Respondent's Brief* 13-14. Respondent has identified no disputed evidence. Instead, he speculates that Robert's evidence might be contradicted in a full evidentiary hearing: "Trial counsel may opine that petitioner, in fact, decided not to file a notice of appeal based upon consultation with counsel and instructed counsel not to file a notice of appeal." *Respondent's Brief* 13. This speculation does not create the kind of evidentiary dispute that needs to be referred to a special master. Robert does not have the burden of proving his claims for relief and disproving any possible justification for his attorney's conduct. Referring this case to a master would only cause further delay.

Justice delayed is justice denied. Robert was convicted and sentenced in August of 1998. His maximum release date is June 20, 2004. *Return to Writ of Habeas Corpus*, Exhibit A. For four and a half years of his six-year sentence, Robert Meier has waited for an appeal to clear his name. *Suggestions 1; Affidavit ¶ 12*. Consistent with established

precedent, this Court should vacate his conviction, remand the case for resentencing, and order the time to appeal to run from the date of resentencing. *See, e.g., State v. Frey*, 441 S.W.2d 11, 14 (Mo. 1969); *State ex rel. Hahn v. Stubblefield*, 996 S.W.2d 103, 108 (Mo. App. 1999). Robert has waited long enough.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH RULE 84.06(g)**

The undersigned certifies:

1. That this Reply Brief complies with Rule 84.06(g) of this Court; and  
That this Reply Brief contains 2,129 words according to the word count feature of Microsoft Word Version 1997 software with which it was prepared.
  2. That the disks accompanying this Reply Brief have been scanned for viruses, and to the best of his knowledge are virus-free.
  3. That this Reply Brief meets the standards set out in Mo. Civil Rule 55.03.
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**CERTIFICATE OF SERVICE**

I hereby certify that two true and accurate copies and one copy on diskette of the foregoing were served by hand-delivery, facsimile transmission, certified mail or United States mail, postage prepaid, this 16th day of December, 2002, to:

Andrew W. Hassell  
Assistant Attorney General  
Office of the Attorney General  
1530 Rax Court  
Jefferson City, MO 65109

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